



No. 83-838

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER,

v.

PAUL B. LORENZETTI, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

Charles Sovel
Freedman and Lorry, P.C.
Attorneys for Respondent
800 Lafayette Building
5th and Chestnut Streets
Philadelphia, PA 19106
(215) 925-8400

QUESTIONS PRESENTED

1. Is not the right of the United States to assert a subrogation lien for benefits paid to a federal employee under the Federal Employees' Compensation Act, 5 U.S.C. §8132, against an employee's third-party recovery subject to the provisions of the State substantive law governing that third-party recovery?

2. May the United States assert a subrogation lien for medical expenses and compensation benefits paid to a federal employee under the Federal Employees' Compensation Act, 5 U.S.C. §8132, against the employee's third-party tort recovery in an action subject to the Pennsylvania No-Fault Insurance Law, 40 P.S. §1009.101 et seq., where the Pennsylvania No-Fault Insurance Law bars the employee from recovering such items as

damages in his third-party tort action?

3. Is not the United States' right to assert a subrogation lien against an employee's third-party recovery in an action subject to the Pennsylvania No-Fault Insurance Law barred by that law's provision barring subrogation with respect to payments considered to be No-Fault benefits?

TABLE OF CONTENTS

	Page
Questions Presented	(1)
Opinions Below	1
Jurisdiction	1
Constitutional, Statutory and Regulatory Provisions Involved..	2
Statement	2
Reasons for Denying the Writ	4
Conclusion	11

TABLE OF AUTHORITIES CITED

Cases:	Page
--------	------

Heusel v. National Mutual Insurance Co., 628 F.2d 833 (3rd Cir. 1980)	7
---	---

Ostrowski v. Roman Catholic Archdiocese, etc., 479 F.Supp. 200 (E.D. Mich. 1979), <u>aff'd.</u> 653 F.2d 239 (6th Cir. 1981)...	4-5
--	-----

Authorities:

Federal Employees' Compensation Act, 5 U.S.C. §8132	5,9-10
--	--------

Federal Tort Claims Act, 28 U.S.C. §2764	7
---	---

28 U.S.C. 1254(1)	2
-------------------------	---

NO. 83-838

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER,

v.

PAUL B. LORENZETTI, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals
(App. A, 1a-11a) is reported at 710 F.2d
982. The opinion of the district court
(App. C, 13a-18a) is reported at 550 F.
Supp. 997.

JURISDICTION

The judgment of the court of appeals

(App.B, 12a) was entered on June 22, 1983. On September 13, 1983, Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including November 19, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY AND
REGULATORY PROVISIONS INVOLVED

The relevant constitutional, statutory and regulatory provisions are reproduced in App. E, 20a-25a).

STATEMENT

Respondent accepts as correct the statement of facts as set forth in the Petition. Broadly stated, these facts present the following situation.

The Commonwealth of Pennsylvania has a No-Fault Insurance Law applicable to motor vehicle accidents. Under this law, a person injured in a motor vehicle

accident is entitled to receive, as No-Fault benefits, payment of his medical expenses and a portion of his wage loss, subject to certain limitations not here relevant. Payments received as workmen's compensation benefits (under any compensation act) are treated as being the equivalent of the receipt of No-Fault payments. In addition to the receipt of No-Fault benefits, a person injured in a motor vehicle accident also may bring a third-party action against a negligent third-party, provided certain threshold requirements are met, but in such actions, no benefits received as No-Fault may be proved or recovered against the third-party. As a result, except in those instances where the injured party's wage loss may be greater than the amount received as a No-Fault benefit, the third-

party recovery is limited to an award of damages for pain and suffering.

The issue presented in this case is whether the United States, as the plaintiff's employer, and as the payor of his No-Fault benefits in the form of workmen's compensation benefits, may subrogate against the employee's third-party recovery of damages for pain and suffering for the amount of benefits paid as No-Fault benefits, given the fact that such No-Fault benefits were not provable or permitted items of damages in the third-party action.

REASONS FOR DENYING THE WRIT

1. As the Court below itself noted (App. A, p.4a), the decision below rejects the views of the Sixth Circuit as expressed in Ostrowski v. Roman Catholic Archdiocese, etc., 479 F.Supp. 200 (E.D. Mich. 1979), aff'd, 653 F.2d

239 (6th Cir. 1981), and to this extent, there now exists a conflict in Circuits. However, the reasoning of the Court below is, we submit, so clearly correct that further review by this Court is neither necessary nor warranted.

2. The concern expressed in the Petition that the decision below would create confusion because of the number of States which have No-Fault laws, many of which differ in varying degrees, is not warranted, nor does it present a reason for this Court granting certiorari. The third-party action permitted a federal employee under the Federal Employees' Compensation Act, 5 U.S.C. §8132 (App.E, p. 21a-22a), is neither defined nor governed by federal law; rather it is based on other substantive law which, in most instances would be State law rather

than federal law. Thus, the third-party action permitted the federal employee always is subject to the laws of the various states, laws which may differ both as to their substantive provisions defining the basis of recovery as well as the elements of damages which may be recovered. If there is confusion in defining a federal employee's right of a third-party recovery, this is a confusion which was intended by Congress when it chose to leave the determination of the right to recover to State law, or other substantive law where applicable.

The advent of No-Fault insurance laws in some States creates no more confusion in the administration of the Federal Employees' Compensation Act than would exist without such No-Fault laws. The falacy in the argument being advanced by

the United States is that it ignores the point that Congress, in permitting a federal employee the right to seek a third-party recovery, consciously chose to leave the substantive provisions governing the right to such a recovery to State law. This has been the consistent policy of Congress in matters of this nature and, it should be noted, that claims brought pursuant to the Federal Tort Claims Act, 28 U.S.C. §2674, always have been subject to State substantive law, with its many variations, and are not based on any uniform, federally defined substantive law of recovery, cf., Heusle v. National Mutual Insurance Co., 628 F.2d 833 (3rd Cir. 1980). Carried to its logical conclusion, the argument here being advanced by the United States would preclude a State (1) from abolishing third-party recovery in particular

instances, (2) adopting statutes of limitations which might be more restrictive than the government would like, or (3) making any similar changes in its substantive tort law.

3. The right of the United States to be reimbursed for its compensation payments from an employee's third-party recovery clearly is one of subrogation, and is dependent upon a third-party recovery being made. The right of subrogation traditionally has been recognized as being an equitable concept, for otherwise the employee might make a double recovery, i.e., recovering his medical expenses and wage loss from his employer, and then recovering these amounts a second time from the third-party. Where there is no third-party recovery for medical expenses or wage

loss, then the employee is not making a "double recovery", and there is no basis for recognizing any right of subrogation. The effect of the argument being advanced by the United States in the instant case is to require that the employee reimburse the government from the proceeds of his third-party action recovery for pain and suffering for those monies which he received for medical expenses and wage loss, when such items were not and could not be recovered in the third-party action. Directing such reimbursement thus would result in denying the injured employee the benefit of a single recovery, clearly not the purpose of subrogation.

The language of the Federal Employees' Compensation Act cannot be blindly interpreted as intending to accomplish so incongruous a result. The subrogation provision of the Federal Employees'

Compensation Act, 5 U.S.C. §8132, originally was adopted in 1916 (and last amended in 1966), long before the No-Fault concept even was on the horizon, let alone a viable statutory enactment. In the context in which 5 U.S.C. §8132 was enacted, the third-party recovery against which a subrogation lien could be asserted universally permitted the proof and recovery of medical expenses and full wage loss. In this context, the effect of permitting subrogation for all payments made as medical expenses and wage benefits was reasonable as such losses were proveable in the injured employee's action for a third-party recovery, and permitting subrogation for all payments made as medical expenses and wage benefits operated only to preclude an injured employee from obtaining a double recovery by requiring the

repayment of compensation benefits from the damages recovered in the third-party litigation. There is no reason to believe that Congress intended any other result, nor is there any reason to believe that Congress ever desired to deprive the employee of the benefit of a single third-party recovery.

The decision below is eminently correct for the reasons stated in the Court below's Opinion and, we submit, further review by this Court is unwarranted.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Charles Sovel, Esq.
Freedman and Lorry, P.C.
800 Lafayette Building
5th and Chestnut Streets
Philadelphia, PA 19106
(215) 925-8400
Attorneys for Respondent